No. 83-412

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROESCH, INC. AND MARKETING DIVISION, INC.,
Petitioners,

vs.

STAR COOLER CORP., HUSSMANN REFRIGERATION, INC.,
AND TOUR ICE MIDWEST, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners seek to overturn a decision by an evenly divided Eighth Circuit sitting *en banc* which is without precedential force and which did no more than affirm by operation of law a manifestly correct decision by the district court. It is only by egregious misstatement and mischaracterization of the record that petitioners strive to create the impression that the Circuits are split on the issue presented by this case and that a question worthy of review by this Court is presented by this case.

The sole claim pursued by petitioners at trial was brought under Section 1 of the Sherman Act, 15 U.S.C. §1, alleging that the three defendants engaged in a price-fixing conspiracy. The only *evidence* offered by petitioners at trial to prove their price-fixing charges was that Star Cooler Corporation terminated a

verbal agreement with them, under which Star Cooler was to sell private label ice merchandisers, after learning of certain dishonest and improper marketing practices being used by petitioners during two discussions with other established distributors (Hussmann Refrigeration, Inc. and Tour Ice Midwest). Characterizing these discussions as "complaints" about petitioners' alleged discounting activities, petitioners assert that the mere reception of such "complaints" followed by termination gives rise to an inference of an antitrust conspiracy.

Following well-established and authoritative precedents, the district court held that such reception of complaints does not give rise to an inference of an antitrust conspiracy and directed verdicts in favor of defendants at the close of plaintiffs' case on liability. 514 F.Supp. 890. On appeal, this decision was affirmed by a unanimous panel of the Eighth Circuit. 671 F.2d 1168. Because of an apparent conflict between the panel's decision in this case and a decision by another panel of the Court in *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), *rev'd on rehearing en banc*, No. 81-1585 (8th Cir. July 12, 1983), *pet. for cert. filed* September 9, 1983 (No. 83-431), both *Roesch* and *Battle* were reheard *en banc*.

Although the Court essentially agreed on the legal standard to be applied, it was evenly divided on the application of this standard to the facts of the cases. However, none of the judges who have considered this case have expressed any support for the factual contentions now being urged by petitioners in their Petition for Certiorari. Indeed, not even the four judges joining in dissent from the outcome of the *en banc* proceedings described the *evidence* which would entitle petitioners to survive a motion for directed verdicts, and they said they "agree[d] that the mere receipt of complaints, even price-related complaints by a manufacturer, from one or more distributors about the selling practices of another distributor do [sic] not indicate illegal concerted action, [because] it is merely normal marketplace behavior for such complaint to be made." (Pet. A. 28)

The Petition for Certiorari should be denied. The *en banc* opinions carry no precedential force, apply only to the parties to the litigation, and are hardly worthy of further review. Petitioners claim that this case presents the same issue as is presented in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 1249 (1983), and conclude that because certiorari has already been granted in *Spray-Rite*, it should similarly be granted in this case. In *Spray-Rite* this Court will have the opportunity to consider whether the evidence adduced by the plaintiff was sufficient to permit the inference of an antitrust conspiracy. Among the facts proven at that trial was that Monsanto received a number of complaints about the plaintiff's discounting from other dealers. But this was hardly the *only* evidence on which the plaintiff relied, and there is *no* support in the Seventh Circuit's *Spray-Rite* decision for a contrary result in *this* case. There is no creditable authority for the theory urged by petitioners in this case that the mere receipt of dealer complaints, standing alone, permits the inference of an antitrust conspiracy. This theory is unworthy of further review by this Court.

STATEMENT OF THE CASE

During eleven working days in 1980, Petitioners Roesch, Inc. and Marketing Division, Inc., a wholly owned subsidiary of Roesch (collectively referred to herein as "Roesch"), had a verbal authorization from Star Cooler to sell *private-label* ice merchandisers, which is a type of refrigerated bin designed to hold packages of ice for retail sale. All such products sold to Roesch were to have the Star markings and nameplates removed and were to bear the Roesch nameplate, logo and silkscreening (Tr. 194-95). It was undisputed that Roesch agreed to sell these products on a private-label basis and that there was *no* agreement to sell Star brandname products to Roesch (Tr. 21-23; 87-92; 191-96; 285-88). Because it was a private-label customer, Roesch

received the largest discount offered by Star to any of its distributors. The only other customers who were offered equivalent discounts were Star's "stocking distributors," who purchased Star-labeled products but who were required to maintain an inventory of Star products, employ repair and service personnel, and honor all warranty claims (Tr. 390-92). Roesch, on the other hand, was not required to undertake any of these services or incur any of these costs, but purchased only the ice merchandisers it had already sold through telephone solicitations, which were then drop-shipped to Roesch's customers (Tr. 137-39; 356-57).

Star Cooler imposed no restrictions of any type on Roesch's ability to sell private label equipment. There was no suggestion made to Roesch concerning resale prices; there were no assignments of territory; there were no attempts to impose customer or geographical restrictions of any type — the only requirement was that Roesch sell the equipment as private-label products. *See* Tr. 108-10; 254-55, 302-03, 411-12.

The evidence at trial showed that Roesch immediately began breaching the parties' agreement by engaging in extensive telephone solicitations claiming that it was authorized to offer "Star Maid" products (Tr. 299-300), a slogan which had not been discussed or approved by any Star representative (Tr. 117, 290). Roesch's president admitted that use of this slogan in telephone solicitations was a "tricky tradename" (Tr. 293) and made it sound as though Roesch was offering "Star-*made*" products, thus improperly trading on the goodwill attached to the Star name (Tr. 292-93).

After learning of these deceptive practices through two telephone calls from Star stocking distributors, Star's General Manager made the decision to cancel the verbal agreement (Tr. 406). The only evidence concerning these two telephone conversations offered at trial was through the reading of the deposition testimony of two witnesses, both of whom confirmed that there

was no request and certainly no *agreement* of any type that Roesch be terminated (Tr. 398-401, 443-45).[1]

There was no other evidence that could conceivably give rise to an inference of a conspiracy. In their Petition petitioners rehash many of the arguments previously raised in their briefs to the Eighth Circuit concerning Star's use of a recommended resale price, an alleged threat made by a Star employee concerning Roesch's resale prices, and alleged statements made after Roesch's termination during a telephone call which Roesch's president secretly recorded (in apparent violation of Illinois law prohibiting such secret recordings).[2] Each of these points was discussed in the panel's opinion and correctly rejected as a basis for inferring a conspiracy (*see* Pet. App. 18-20).

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[1] One of these calls was made by an employee of Hussmann Refrigeration's Houston division, and Star's General Manager testified that "[h]e just wanted to let me know what was happening" and that "I have not talked to Vince Larocca since that day" (Tr. 400-01). The second call was made by a St. Louis distributor of Star Products, Tour Ice Midwest, who called and spoke for less than a minute because "I really wanted to know was I getting the best price" (Tr. 444).

[2] While petitioners quote out of context large portions of the transcript of this recording, they do not quote Mr. Smith's statement at the very beginning of the recording where he said "It is illegal for us even to, to, to tell you what you're to sell for and we're not going to do that" (Pl. Exh. 16, p. 2). A fair reading of this transcript reveals that Roesch was terminated as a private label customer because it was "talking about Star and not about your own product," and because Roesch's unfair use of the Star name while enjoying the private-label discount meant that Roesch could undercut all other Star distributors with impunity because it was enjoying the equivalent of a lower price than that which was offered to any other distributor. Such preferential treatment would not only expose Star to claims of Robinson Patman Act violations, but would also create "trouble with our distribution system" (*id.*).

Petitioners also raise one point concerning certain written agreements which allegedly prove "Star had a history of supporting, or fixing, resale prices." (Pet. 6) Petitioners fail to mention the pivotal facts upon which the trial court and the panel ruled that these documents were inadmissible:

(1) These agreements were entered into by Star Cooler prior to its acquisition by Hussmann;

(2) These agreements were terminated upon the direction of Hussmann's General Counsel immediately following Hussmann's acquisition of the company in 1978;

(3) With two exceptions relating to certain counties in Texas and Illinois, these agreements did not refer to ice merchandisers but to entirely different product lines not at issue in this litigation; and

(4) *None* of the present senior management of Star brought in by Hussmann, who were responsible for managing the company at the time of the Roesch transaction, had *any* involvement in these old agreements.

These facts were established in discovery and provided the basis for Star's *Motion in Limine* filed prior to trial to exclude these cancelled and irrelevant documents. *Plaintiffs did not dispute these facts before the trial court and did not contest them in their briefs to the panel.*

Now, however, in their Petition for Certiorari, petitioners make the extraordinary claim that "a jury could reasonably have inferred that the alleged cancellations of the contract were mere 'window dressings' " (Pet. 26), and further draw some adverse and sinister inference about Star's intent in its dealings with Roesch. No such assertion was ever made at trial, or before the panel, and it is obviously improper to attempt to make it now. Petitioners' argument is flatly at odds with the controlling

legal principle that they may not rely on the hope that a jury might choose to disbelieve sworn testimony, *Dyer* v. *MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952); *Lundeen* v. *Cordner*, 354 F.2d 401, 406-09 (8th Cir. 1966); it is also unsupported by any evidence of record.[3]

In truth, the "evidence" of conspiracy in this case amounted to the fact that Star received two telephone calls (as to which, the sworn testimony established, no agreement or conspiracy was created), and Roesch was subsequently terminated as a private-label customer. During the eleven days Roesch sold Star-manufactured products, it sold approximately $27,000 worth of goods—for a net profit of about $2,700 (A. 30-33). It then chose to pursue this lawsuit, seeking more than one million dollars in trebled lost profits based on sales projections twenty years into the future, notwithstanding Star's good faith offer to resume selling to Roesch on a private-label basis if the parties entered into a written agreement (Ex. 21).

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[3] Indeed, the undisputed and unambiguous testimony during depositions taken of every present or former Star officer confirmed that these agreements had been cancelled several years before the inception of the Roesch/Star relationship. Star's former General Manager, Robert Cordes, testified that he had personally been directed by Hussmann's General Counsel to cancel the agreements and that he followed these instructions (Cordes dep. tr. 6-8, 29-30). Star's present General Manager, David Smith, stated that he had never seen the agreements in question before his deposition (Smith dep. tr. 133), but that "[t]he only thing I knew was that they were all cancelled" (*id.* at 134). Lonny Duncan, who served as Star's Sales Manager during 1979, testified that "to my knowledge, all agreements that were in existence have been terminated" (Duncan dep. tr. 47). Likewise, Star's Sales Manager at the time of the Roesch transaction, Stan Griggs, testified that Star had no agreements in effect that restricted resale prices or imposed territorial restrictions of any type (Griggs dep. tr. 38).

These facts were detailed in Star's pre-trial *Motion in Limine*. Plaintiffs made no offer of proof during trial that they were prepared to make any factual showing that these agreements were still in effect or had not been cancelled in the manner described by Star's officers during their depositions. *See* Tr. 375-78; 417-18; 456-58.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners seek to tag-along with the grant of certiorari in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 1249 (1983), claiming that because this case purportedly "raises the same issues as *Spray-Rite*," (Pet. 4) accordingly it is "an appropriate companion case to *Spray-Rite*" (*id.* at 17). Respondents disagree, for the following reasons:

1. *Roesch* is of interest only to the parties to the litigation. The opinions by the evenly-divided Eighth Circuit are without precedential value. *Ohio* v. *Price*, 364 U.S. 263, 264 (1960). The normal practice of the Court is to consider cases of general public importance, and to decline to grant certiorari in cases of such limited importance. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). *Roesch* plainly fails to satisfy this standard.

2. *Roesch* was correctly decided under whatever standard will ultimately be announced by the Court in *Spray-Rite* because there is no creditable authority for the proposition that the mere reception of dealer complaints, followed by a termination, permits the inference of an antitrust conspiracy. The extreme and illogical rule of law espoused by these petitioners goes well beyond any permissible reading of *Spray-Rite* and is at variance with the considered (and, we submit, correct) judgments of the First, Second, Third, Sixth, Ninth and Tenth Circuits.

Petitioners recognize that the vast majority of the Courts reviewing this issue of the quantum of evidence required to prove a Section 1 conspiracy would clearly have upheld directed verdicts in this case. The district court and then the panel relied on the following authorities in so holding: *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451

U.S. 911 (1981); *Borger* v. *Yamaha International Corp.*, 625 F.2d 390, 395 (2d Cir. 1980); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.) (*en banc*), *439 U.S. 946 (1978); Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 675 (9th Cir. 1975); *Carr Electronics Corp.* v. *Sony Corp. of America*, 472 F.Supp. 9, 13 (N.D. Cal. 1979); *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 719 n. 3 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969); *Carbon Steel Products Corp* v. *Alan Wood Steel Co.*, 289 F.Supp. 584, 588 (S.D.N.Y. 1968).

Since the time of the original panel decision, the First and Sixth Circuits have rendered the same result, refusing to permit the inference of an antitrust conspiracy merely from the receipt of dealer complaints. *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982). Likewise, the Second, Third and Ninth Circuits have reaffirmed their adherence to this rule of law. *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 176 (1982); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 362 (1982); *Venture Technology, Inc.* v. *National Fuel Gas Co.*, 685 F.2d 41 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 362 (1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-95 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981) (citing *Sweeney*); *Filco* v. *Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir. 1983).

Although they have not squarely considered this precise issue, the Fifth and Tenth Circuits have similarly indicated approval of these principles. *See Sports Center, Inc.* v. *Riddell, Inc.*, 673 F.2d 786, 791-92 (5th Cir. 1982) (communications with competing distributors about plaintiff did not give rise to inference of conspiracy); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 844-45 (10th Cir. 1981) (finding of unilateral termination not plainly erroneous under F.R.Civ.P. 52(a)).

Faced with this formidable array of contrary authority, petitioners attempt to establish a conflict in the Circuits, citing *Spray-Rite* and *Bostick Oil Co.* v. *Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983), *pet. for cert. filed* August 17, 1983 (No. 83-268). They broadly assert that "[b]oth the Seventh and Fourth Circuits would unquestionably have permitted the *Roesch* case to have been decided by a jury," (Pet. 13), and then claim that not only have all the other Circuits deciding to the contrary erred in their construction of the antitrust laws, they have impaired a plaintiff's right to trial by jury! (Pet. 17-25)

The "conflict in the Circuits," if it exists at all, is gravely exaggerated, and is more apparent than real. First, there is no substantial deviation in the standard of review of summary dismissals of antitrust claims; the role of judge and jury are expressed in almost identical terms in each of these cases, and it is beyond dispute that the grant of either directed verdicts or summary judgment in the proper cases does not contravene a Seventh Amendment right to trial by jury.

Second, petitioners misunderstand the nature of the legal issue involved in these cases. The rule of law on which respondents rely is *not* a substantive rule of antitrust law but a rule of evidence. The law is and remains under Section 1 of the Sherman Act that "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." This rule was announced long ago in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946), and remains unchanged to the present day.

The issue in each of the many dealer termination cases cited above was whether the *evidence* adduced by the plaintiff permitted such an inference of "a unity or purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* As would be expected, although there are factual similarities in each of these cases, there are also substantial factual variations. The proofs offered by the dif-

ferent plaintiffs vary substantially, and the courts were required to assess the underlying factual circumstances of each case.

But *none* of these cases go so far as to establish a rule that the mere existance of dealer complaints, followed by a termination, prove a conspiracy. Both *Spray-Rite* and *Bostick* depend on a host of *additional* facts for their findings that sufficient evidence of a conspiracy existed to warrant a trial by jury. For example, in *Spray-Rite,* the Court cited the following:

> Spray-Rite satisfied this burden of proof. Thomas Dille, a former Monsanto District Manager for Spray-Rite's area of primary responsibility, testified that he received numerous complaints about Spray-Rite's price-cutting practices. He further testified that some distributors requested that Monsanto terminate Spray-Rite's supply of Monsanto herbicides. James Hopkins, president of Hopkins Agricultural Chemical Company, a Monsanto distributorship in competition with Spray-Rite, testified that he complained to Monsanto about Spray-Rite's prices. Emmet McCormick, a former Monsanto Area Supervisor, testified that Monsanto was concerned about stabilizing the resale price of its herbicides and that Monsanto considered Spray-Rite a price-cutter. Yapp, president of Spray-Rite, testified that various Monsanto District Managers in 1966, 1967, and 1968 threatened to terminate his distributorship if he did not raise his prices. Finally, Monsanto did terminate Spray-Rite in 1968.

684 F.2d at 1239.

Spray-Rite thus presented a case where distributors admitted that they complained about the plaintiff's prices (no such evidence exists in this case). There was direct evidence that the distributors requested that Monsanto retaliate against Spray-Rite for its price-cutting (the undisputed evidence in this case is that there were no such requests). There was evidence from a Monsanto employee that the Company wished to stabilize resale

prices (again, no such evidence exists in this case). Finally, there was evidence of a pattern of threats of termination by Monsanto to induce compliance by Spray-Rite with price standards (in this case, there were no recommendations to Roesch concerning its resale prices at the inception of the relationship and, although one witness claimed to have later received a recommendation concerning resale price from a Star Cooler salesman, she testified that no threats were made). Although *Spray-Rite* is thinly reasoned, there is no necessary conflict between the *Spray-Rite* decision and *Roesch*.[4]

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[4] The state of the law in the Seventh Circuit is muddled, though, because another panel of that Court has also considered and cited with approval the *Sweeney* rule in *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982). The *Valley Liquors* panel sustained the denial of a preliminary injunction in a dealer termination case, based on the holding that discussions between the manufacturer and other distributors about a price-cutter do not justify an inference of a conspiracy. Judge Posner wrote for the Court:

> But it is not enough that the distributor, that is Continental or Romano, have this desire [to reduce price competition]; the supplier must have it too. *See Alloy Int'l Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 n.6 (7th Cir. 1980); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980). If Renfield wanted to restrict the distribution of its products in order to be a more effective competitor, the antitrust laws would not forbid it to do so merely because its distributors went along so that they would have less price competition. It is therefore not enough to show that Continental and Romano, acting separately (for if they acted together that would be horizontal action), wanted to get rid of a competitor; there must also be evidence that in terminating Valley Renfield was acceding to their desire rather than acting to promote an independent conception of its self-interest. There was no such direct evidence and the circumstantial evidence was as we have pointed out too tenuous to require the trier of fact to draw the inference that Valley asked him to draw.

678 F.2d at 744.

The Fourth Circuit's decision in *Bostick Oil* is equally distinguishable on its facts, although again we do not intend to debate the merits of this decision and will not speculate on the outcome of the pending application by Michelin Tire for certiorari. We note, however, that the Court in *Bostick Oil* took pains to emphasize the number and character of dealer pricing complaints, the responses to them by Michelin senior management, the admitted role of these complaints in bringing about the plaintiff's termination, and other inconsistencies in Michelin's proffered explanations for the termination (*see* 702 F.2d at 1211-13), and disavowed an intent to reject the rule of law relied upon in this case:

> Michelin argues strenuously that mere complaints do not a conspiracy make, and cites to us cases for this proposition. *See, e.g., H.L. Moore Drug Exchange* v. *Eli Lilly and Company,* 662 F.2d 935 (2d Cir. 1981), *cert. denied,* ____ U.S. ____, 103 S.Ct. 176 (1982); *Roesch, Inc.* v. *Star Cooler Corporation,* 514 F.Supp. 890 (E.D. Mo. 1981), *aff'd,* 671 F.2d 1168 (8th Cir. 1982). *Were this a proper case, we might well agree with this unstartling principle. In this case, however, the evidence elicited at trial showed more than just uninfluential competitors' complaints "standing alone"* (citing *H.L. Moore Drug).*

702 F.2d at 1213 (emphasis supplied).

Both *Bostick* and *Spray-Rite* add some confusion to this area of the law by their apparently gratuitous references to the panel decision in *Battle* v. *Lubrizol Corp.* (which has now been voided by the decision by the Eighth Circuit *en banc*). But they fall far short of supporting petitioners' extravagant claim that these courts would have "unquestionably" come to a different result in this case, and these two isolated decisions do not warrant the grant of certiorari in this case.

3. At the heart of this Petition for Certiorari is the suggestion that this Court should undertake a review of the record in this case to make findings of fact — an undertaking completely inappropriate under the Court's customary standards of review. None of the judges thus far reviewing this case has offered any support for the factual findings proposed by the petitioners (reflecting the total absence of support for them in the record). Indeed, petitioners even go so far as to suggest that the refusal of the district court to admit into evidence antiquated, cancelled agreements, entered into by prior management with unrelated parties involving (for the most part) unrelated product lines, is itself an issue worthy of plenary review. The excessive liberties petitioners have taken with the record to try to raise this issue at this time eloquently underscore the utter lack of merit both of this issue and of the case. No purpose will be served in further delaying the dismissal of this litigation. Petitioners have had ample opportunity to prove their antitrust claim and they simply have failed to make a submissible case.

CONCLUSION

For all the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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